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**From:** Fotouhi, David [Fotouhi.David@epa.gov]  
**Sent:** 8/17/2018 8:26:40 PM  
**To:** Ross, David P [ross.davidp@epa.gov]  
**CC:** Leopold, Matt (OGC) [Leopold.Matt@epa.gov]  
**Subject:** FW: FDEP proposed approach to ESA on state 404 permits  
**Attachments:** image2018-08-06-205339.pdf; Draft FL MOA language on ESA 5-2v2.docx; Proposed Path on FL ESA 5-2.docx

Dave:

I apologize that I was not able to join the 404(g) briefing today. My staff let me know that you had some questions about the State's ESA approach, so I wanted to bump this email and its attachments to the top of your inbox. Matt and I are happy to discuss before our meetings on Tuesday.

Best,

David

**David Fotouhi**

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**From:** Fotouhi, David  
**Sent:** Monday, August 13, 2018 2:54 PM  
**To:** Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>  
**Subject:** FDEP proposed approach to ESA on state 404 permits

DELIBERATIVE—DO NOT RELEASE

Matt, Dave,

Last week, Region 4 shared the attached PDF detailing an approach that Florida DEP is proposing to deal with potential Endangered Species Act liability related to state-issued CWA section 404 permits. Under this approach, if FDEP, in consultation with FWC, determines that discharges authorized under the permit have reasonable potential to affect federally listed species or critical habitat, FDEP would submit a permit application and supporting documents to EPA, and EPA would designate FDEP a non-Federal representative to conduct informal consultation and prepare a biological assessment. If FDEP determines that the project is likely to adversely affect listed species, EPA would enter into formal consultation with FWS and prepare a biological opinion.

The Water Law Office and R4 are aware that this has been the preferred approach of stakeholders wishing to obtain the benefits of section 7 consultation to authorize incidental take (rather than having to go through what can be a cumbersome take authorization process with the Services under section 10 of the ESA), after the State assumes the section 404 program. As we previously discussed, this particular approach is

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I wanted you all to be aware of this in case Trey in R4 or others reached out. I'd be glad to discuss further in anticipation of your meeting later in the month.

Best,

David

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